



Federal Communications Commission
Washington, D.C. 20554

June 6, 2012

DA 12-890

In Reply Refer to:

1800B3-ATS

Released: June 6, 2012

Donald E. Martin, Esq.
Donald E. Martin, P.C.
P.O. Box 8433
Falls Church, VA 22041

John M. Pelkey, Esq.
Garvey Schubert Barer
1000 Potomac Street, N.W.
Fifth Floor, Flour Mill Building
Washington, DC 20007

In re: **NCE MX Group 443**

New NCE (FM), Prosser, Washington
Northwest Communities Education Center
Facility ID No. 172943
File No. BNPED-20071018AQJ

New NCE (FM), Benton City, Washington
Prosser Seventh-day Adventist Church
Facility ID No. 174194
File No. BNPED-20071022BRO

Petition for Reconsideration

Dear Counsel:

We have before us (1) a Petition for Reconsideration (“Petition”) filed by Prosser Seventh-day Adventist Church (“PSDA”), seeking reconsideration of the staff’s August 26, 2011, decision¹ denying PSDA’s Petition to Deny the application of Northwest Communities Education Center (“NCEC”) for a new noncommercial educational (“NCE”) FM station in Prosser, Washington (“NCEC Application”), granting the NCEC Application, and dismissing PSDA’s application for a new NCE FM station in Benton City, Washington (“PSDA Application”);² and (2) NCEC’s request for waiver of Section 73.3573 of the Commission’s Rules (“Rules”).³ For the reasons stated below, we grant the Petition in part, deny NCEC’s waiver request, rescind the grant of the NCEC Application, dismiss the NCEC Application, and accept for filing the PSDA Application.

Background. As discussed in the *Staff Decision*, the NCEC Application was identified as the tentative selectee of NCE MX Group 443.⁴ PSDA filed a Petition to Deny the NCEC Application,

¹ *NCE MX Group 443*, Letter, Ref. 1800B3-ATS (MB August 26, 2011) (“*Staff Decision*”).

² PSDA filed the Petition for Reconsideration on September 30, 2011. NCEC filed an Opposition to Petition for Reconsideration (“Opposition”) on October 13, 2011. PSDA filed a Reply to Opposition to Petition for Reconsideration (“Reply”) on October 25, 2011.

³ 47 C.F.R. § 73.3573.

⁴ See also *Comparative Consideration of 52 Groups of Mutually Exclusive Applications for Permits to Construct New or Modified Noncommercial Educational FM Stations Filed in the October 2007 Filing Window*, Memorandum Opinion and Order, 25 FCC Rcd 11108, 11128-11129 (2010) (“*Tentative Selectee Order*”).

asserting that PSDA was not entitled to the two points it claimed for diversity of local ownership and disputing the Commission's assertion that PSDA did not provide documentation to support its claim for diversity points. In the *Staff Decision*, the Bureau determined that although the Commission had in fact inadvertently overlooked PSDA's diversity documentation, that documentation was nonetheless insufficient to support the awarding of diversity points and therefore denied PSDA's Petition to Deny and granted the NCEC Application.

NCEC is currently the licensee of NCE Station KDNA(FM), Yakima, Washington. NCEC entered into an agreement with Sea-Mar Community Health ("Sea-Mar") on May 12, 2011, which required that the members of NCEC Board of Directors would be replaced by the members of the Sea-Mar Board of Directors.⁵ NCEC filed a transfer of control application of Station KDNA on June 8, 2011.⁶ The NCEC board was replaced by the Sea-Mar board on August 11, 2011. Subsequently, the NCEC Application was granted on August 26, 2011, and NCEC filed an amendment and waiver request on September 12, 2011 ("Waiver Request").⁷ Thus, at the time of the *Staff Decision*, NCEC had not amended its application to reflect the new composition of its board and the Bureau was unaware of that the entire NCEC board had been replaced.

In the subject Petition, PSDA requests reconsideration of the *Staff Decision* on the grounds that: 1) NCEC has had a complete transfer of control of ownership, constituting a major change warranting dismissal of its application; and 2) its own application should have been awarded two points for diversity of local ownership. PSDA therefore argues that the NCEC Application should be dismissed and the PSDA Application should be accepted for filing.

Discussion. The Commission will consider a petition for reconsideration only when the petitioner shows either a material error in the Commission's original order, or raises additional facts, not known or existing at the time of the petitioner's last opportunity to present such matters.⁸ Petitions for reconsideration which rely on facts not previously presented to the Commission may be granted if the Commission determines that consideration of the facts relied on is required in the public interest.⁹

Pursuant to Section 73.3573(a) of the Rules,¹⁰ a fifty percent change in the governing board of an NCE applicant would generally be considered a major change and would not be permissible outside of a filing window.¹¹ The Commission, in the *NCE Omnibus Order*, however, determined that, under some circumstances, rule waivers would be appropriate.¹² In the *NCE Omnibus Order*, the Commission delineated the circumstances under which waivers might be appropriate. The Commission considers whether the change occurred gradually and pursuant to state law and not as an outgrowth of any party's

⁵ Petition at Exhibit.

⁶ File No. BTCED-20110608ABC.

⁷ PSDA states that it was unable to file the amendment and waiver request electronically through CDBS because the application by this time had been granted.

⁸ See 47 C.F.R. § 1.106(c) and (d). See also *WWIZ, Inc.*, Memorandum Opinion and Order, 37 FCC 685, 686 (1964), *aff'd sub nom. Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert. denied*, 387 U.S. 967 (1966).

⁹ See 47 C.F.R. § 1.106(c)(2). See also *Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations (Scranton and Surfside Beach, South Carolina)*, Memorandum Opinion and Order, 4 FCC Rcd 2366 (MB 1989).

¹⁰ 47 C.F.R. §73.3573(a).

¹¹ See *Comparative Consideration of 76 Groups of Mutually Exclusive Applications for Permits to Construct New or Modified Noncommercial Educational FM Stations*, Memorandum Opinion and Order, 22 FCC Rcd 6101, 6123 (2007) ("*NCE Omnibus Order*").

¹² *Id.* at 6124.

desire to gain control over an entity which has pending an NCE new station application.¹³ The Commission also considers whether the change occurred naturally as the organization evolved and grew.¹⁴ Indeed, the Commission has recognized that changes in NCE governing boards are inevitable over periods as brief as four years.¹⁵ Nevertheless, waivers are not warranted in all circumstances.¹⁶ As an example, the Commission denied a waiver where the applicant had undergone at least two major and sudden changes of control subsequent to the filing of its application, finding that the changes were evidence of an attempt to gain control of the applicant and were not the gradual replacement of board members over time, in the ordinary course of the applicant's corporate existence.¹⁷

NCEC's waiver request characterizes the total change of its board's composition as routine business and not for the purpose of acquiring the pending application. Specifically, it states that the purpose of change of directors was "to help sustain [NCEC's] operations"¹⁸ and "to permit NCEC to continue to fulfill its mission."¹⁹

We disagree. None of the factors warranting a waiver of Section 73.3573(a) found in the cases proffered by NCEC or in prior Commission decisions are present in the instant case.²⁰ The change of the control of NCEC was total and sudden - not gradual, not the result of the normal ending of terms of office or the operation of law, and not made over a long period of time.²¹ The total changeover of the board resulted

¹³ *Id.* at 6124.

¹⁴ *Id.* at 6124. In the *Reexamination of the Comparative Standards for Noncommercial Educational Applicants* the Commission found that "gradual changes in the board of the type that ordinarily occurs in most NCE organizations, will not, for purposes of a holding period be treated as the equivalent of a sudden transfer of control or assignment." See *Reexamination of the Comparative Standards for Noncommercial Educational Applicants*, Report and Order, 15 FCC Rcd 7386, 7426 (2000).

¹⁵ *Id.* at 6125.

¹⁶ *Id.* at 6125.

¹⁷ *Id.* at 6128. Alternatively, it considered the possibility that the applicant, as constituted, was not the entity that originally filed the application. Under either scenario, the Commission concluded, the dismissal of the application would be appropriate.

¹⁸ Waiver Request at 2.

¹⁹ Opposition at 5.

²⁰ NCEC cites *Constellation Communications, Inc.*, Memorandum Opinion and Order, 11 FCC Rcd 18502, 18512 (1996), in support of its waiver request. We find this case inapposite because the change in ownership of the applicant in question there, Constellation Communications, Inc., was not a total change of ownership, while NCEC's change in ownership resulted in its *entire* board being replaced. Moreover, Constellation's change of ownership took place over a period of three and a half years, whereas NCEC's total board change occurred at once. Finally, that case involved mobile satellite systems rather than the NCE service. Although the language of 47 C.F.R. § 25.116 is analogous to that of 47 C.F.R. § 73.3573 with respect to an applicant's major change in ownership, different services present different factual and policy issues in connection with a waiver request. Where, as here, the Commission has specifically delineated the factors it will consider for a waiver request in the NCE context, a decision in the mobile satellite service has little if any precedential value.

²¹ *Cf. The KBOO Foundation*, Letter, 26 FCC Rcd 13366 (MB 2011) (granting waiver of Section 73.3573(a)(1) where partial board turnover was incremental over time and did not break continuity of control); *Eagle's Nest Fellowship Church*, Letter, 23 FCC Rcd 862 (MB 2008) (Petitioner's allegation that there had been a major change of control was erroneous as only one director - out of three - had been replaced over the ten year period); *Thomas Aquinas School*, Letter, 22 FCC Rcd 17651 (MB 2007) (granting waiver of Section 73.3573(a)(1) where partial board turnover was incremental over time and did not break continuity of control); *Moody Bible Institute*, Letter, 22 FCC Rcd 11116 (Med. Bur. 2007) (affirming waiver of the major change rule where applicant's board changed as a result of routine and inevitable changes over sixteen years).

in 100 percent of the NCEC board members being replaced with Sea-Mar board members.²² NCEC replaced its *entire* board of directors outside of the filing window. This constituted a major change in its application. None of the grounds for waiver of Section 73.3573(a) of the Rules that the Commission has identified are present in this case, and NCEC has failed to provide *any* persuasive authority. Accordingly, we must rescind the grant of the NCEC Application and dismiss the application.

In light of our dismissal of the NCEC Application, PSDA is the only remaining applicant in MX Group No. 443.²³ We have studied the PSDA application and have determined that it is acceptable for filing. We, therefore, will accept the PSDA application for filing and tentatively conclude that the public interest would be served by grant of that application for a construction permit for a new NCE FM station at Benton City, Washington. If, after a 30-day petition to deny period has run, there is no substantial and material question concerning the grantability of the tentative selectee's application, we intend, by public notice, to grant the PSDA Application with appropriate conditions.

Conclusion/Actions. Accordingly, IT IS ORDERED that the Prosser Seventh-day Adventist Church Petition for Reconsideration IS GRANTED to the extent indicated herein and DISMISSED in all other respects.

IT IS FURTHER ORDERED that the grant of application of Northwest Communities Education Center (File No. BNPED-20071018AQJ) for a permit to construct a new NCE FM station in Prosser, Washington, IS HEREBY RESCINDED and the application IS DISMISSED pursuant to Section 73.3573(a) of the Commission's Rules.²⁴

IT IS FURTHER ORDERED, that the application filed by Prosser Seventh-day Adventist Church (File No. BNPED-20071022BRO) is ACCEPTED FOR FILING and TENTATIVELY SELECTED to be awarded a construction permit for a new NCE FM station at Benton City, Washington. If, after a 30-day petition to deny period has run, there is no substantial and material question concerning the grantability of the tentative selectee's application, we intend TO GRANT the referenced Prosser Seventh-day Adventist Church application CONDITIONED UPON its compliance with Section 73.7002(c) of the Rules.²⁵

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau

²² *Fatima Response, Inc.*, Letter, 21 FCC Rcd 11711 (MB 2006) (dismissing NCE application where applicant had experience two total changes in board composition), recon. denied, 22 FCC Rcd 8402 (MB 2007); *Ocean Pines LPB Broadcast Corp.*, Initial Decision, 4 FCC Rcd 7767 (ALJ 1989) (Administrative Law Judge dismissed an NCE application following a major change in the governing board which involved a sudden majority change in the board).

²³ *See Tentative Selectee Order*, 23 FCC Rcd at 11128-29. Because we are dismissing the NCEC Application, we do not need to consider PSDA's argument that the *Staff Decision* erred in not awarding its application points for diversity of ownership.

²⁴ 47 C.F.R. § 73.3573(a).

²⁵ 47 C.F.R. § 73.7002(c).